

**MINUTES FOR THE BOARD OF ADJUSTMENT MEETING**

October 28, 2011

- I. **ATTENDANCE** - The Chairman called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, on October 28, 2011. Members present were Chairman Louis Stout, Kathryn Moore, Janice Meyer, Noel White, James Griggs and Barry Stumbo (arrived at 1:03 p.m.). Member Thomas Glover was absent. Others present were Jim Hume, Division of Building Inspection; Chuck Saylor, Division of Engineering; Jim Gallimore, Division of Traffic Engineering; and Rochelle Boland, Department of Law. Staff members in attendance were Jim Marx, Bill Sallee and Wanda Howard.

- II. **APPROVAL OF MINUTES** - The Chairman announced that the minutes of the September 30, 2011 meeting would be considered at this time.

Action – A motion was made by Ms. Meyer, seconded by Ms. White, and carried unanimously (Stumbo, Glover absent) to approve the minutes of the September 30, 2011 meeting.

At this point, Chairman Stout asked all those persons present who would be speaking or offering testimony to stand, raise their right hand and be sworn.

III. **PUBLIC HEARING ON ZONING APPEALS**

- A. **Sounding the Agenda** - In order to expedite completion of agenda items, the Chairman sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chairman announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **A-2011-71: BALL and WRIGHT CAPITAL HOLDINGS** - appeals for an administrative review to allow a third wall sign on a bank building in a Professional Office (P-1) zone, on property located at 998 Governors Lane. (Council District 10)

The Staff Recommends: Disapproval, for the following reasons:

1. Article 17-7(e)1 of the Zoning Ordinance states that one wall sign per street frontage is permitted in the Professional Office (P-1) zone, with a maximum of two wall signs per building.
2. There are no provisions in Article 17-7(e) for canopy signs in the P-1 zone.
3. Permitting a third wall sign for this building would be contrary to a condition previously imposed by the Board (case # A-2010-27).
4. The Board is not authorized to increase the number of permitted signs, pursuant to Article 17-8(a) of the Zoning Ordinance.

Representation – Mr. Richard Murphy, attorney, was present on the appellant's behalf and requested a postponement of this case until the December 16 meeting. He explained that there is a text amendment to the Zoning Ordinance pending consideration by the Urban County Council, which may have an impact on this (case); and they wanted to allow time enough for it to go through.

Action – A motion was made by Mr. Griggs, seconded by Mr. Stumbo, and carried unanimously (Glover absent) to postpone **A-2011-71: BALL and WRIGHT CAPITAL HOLDINGS** until the December 16 meeting.

- b. **C-2011-70: BOONE CREEK ADVENTURES, LLC** - appeals for a conditional use permit to construct and operate an agricultural market and outdoor recreational facility with accessory

camping facilities in the Agricultural Rural (A-R) zone, on property located at 8291 & 8385 Old Richmond Road and 8385 Durbin Lane. (Council District 12)

The Staff Recommends: Postponement, for the following reasons:

1. The number and general location of improvements to be undertaken as part of the outdoor recreational facility, such as catwalks, suspension bridges, and zip lines, need to be identified on an amended site plan and otherwise described by the appellant. This should include the location of any bridges intended to cross Boone Creek over to Clark County.
2. The number and general location of tree houses need to be identified on an amended site plan and otherwise described by the appellant, along with a description of the tree houses size and layout, as well as the type of sewage treatment to be provided.
3. A complete site plan for the proposed agricultural market, addressing items outlined in Article 8-1(d)7(o) of the Zoning Ordinance, is needed. This may be incorporated into an amended site plan for the overall project, rather than presented as a separate document, if desired by the appellant.
4. Specific information is needed to clarify what portion of 8385 Durbin Lane is to be purchased by the appellant or otherwise included as part of the conditional use request, since no formal subdivision plat has been filed for this purpose, as of yet.
5. Variance requests may be needed for any new or expanded/relocated buildings that will not comply with the 300' front yard setback requirement of the Zoning Ordinance.

Mr. Marx told the Board that a letter was received from the applicant's attorney, Mr. Bruce Simpson, requesting a postponement of this case until the November 18 meeting, in concurrence with the staff's recommendation.

After determining that there were no objectors to this case present, the Chairman called for a motion.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Moore and carried unanimously (Glover absent) to postpone **C-2011-70: BOONE CREEK ADVENTURES, LLC** until the November 18 meeting.

2. No Discussion Items - The Chairman asked if there are any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.

- a. **V-2011-72: JAMES M. LUDKA** - appeals for a variance to reduce the required side yard from 3' to 0', and alley setback from 6' to 1', in order to retain an existing fence in a Planned Neighborhood Residential/Historic District Overlay (R-3/H-1) zone, on property located at 432 North Broadway. (Council District 1)

The Staff Recommends: Withdrawal of the alley setback variance, for the following reasons:

1. The provisions of Article 15-6(a)(2) specifically relate to accessory buildings, not to fences.
2. Article 15-4(b) permits a fence up to 8' in height within a front yard created by abutment to an alley. The subject property is a "through lot" with a front yard that abuts Caldwell Alley.
3. Driver visibility concerns are more appropriately addressed by Article 3-3 of the Zoning Ordinance pertaining to the maintenance of sight distance triangles.

The Staff Recommends: Approval of the requested side yard variance, for the following reasons:

- a. Reducing the required side yard from 3' to 0', only for the purpose of allowing the preexisting portion of the fence to remain where currently located, should not adversely affect the public health, safety, or welfare, nor alter the character of the area. Similar fences are common in the general vicinity.
- b. The location of the preexisting fence on the side property line is a special circumstance that contributes to justifying a side yard reduction.
- c. Strict application of the Zoning Ordinance would result in all portions of the fence not to

the rear of the dwelling having to be placed 3' back from the side property line. This would create an awkward jog in the fence, and would result in a design that is clearly out of character with how other fences have been erected in this historic neighborhood.

- d. The appellant is attempting to maintain a historic property in a manner that is consistent with how other properties in the neighborhood have been developed, and there is no indication of any intent to circumvent a requirement of the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The fencing may remain where currently located, as depicted in the submitted application and site plan, subject to any modifications that may be required to comply with Article 3-3 of the Zoning Ordinance relating to the maintenance of sight distance triangles.
2. If deemed necessary by the Division of Historic Preservation, a Certificate of Appropriateness, or other type of applicable permit, shall be obtained for the final location and design of the fence within the Northside Historic District.
3. A fence permit shall be obtained from the Division of Building Inspection within 30 days of action by the Board and/or the Board of Architectural Review, whichever is later.

Representation – Neither the appellant nor representation was present when this case was initially called. Mr. Sallee said he would try to get in contact with the appellant and report back to the Board. Chairman Stout then proceeded to the next case on the agenda.

(Following disposition of V-2011-58: JAMES HICKEY, the Chairman returned to the aforementioned case.)

Mr. Sallee stated that he had spoken with Mr. Ludka by phone and relayed his apology for not being present due to some confusion about the time of the meeting. He said Mr. Ludka was agreeable to postponing this case until the November 18 meeting.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Griggs, and carried unanimously (Glover absent) to postpone V-2011-72: JAMES M. LUDKA until the November 18 meeting.

- b. V-2011-73: MID-AMERICA APARTMENTS - appeals for a variance to reduce the required 20' setback for a free standing identification sign to 0' in a High Density Apartment (R-4) zone, on property located at 151 S. Locust Hill Drive. (Council District 7)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity, provided that the required sight triangle for driver visibility is maintained once the final location of the sign is determined.
2. Granting the requested variance will not result in an unreasonable circumvention of the requirements of the Zoning Ordinance, as the sign will be much smaller than an existing sign to be replaced that is partially at a 0' setback.
3. The location of the existing sign is a special circumstance that contributes to justifying this request to eliminate the required 20' setback.
4. Strict application of the Zoning Ordinance would force the appellants to place the new sign 20' farther back from the street than the existing sign, in areas that would likely require some existing mature landscaping to be removed or significantly altered.

This recommendation of approval is made subject to the following conditions:

1. The sign shall have a maximum size of 32 square feet and shall be erected in accordance with the submitted application and site plan, with allowances to alter the location (per condition #4).
2. All necessary permits shall be obtained from the Division of Building Inspection prior to erection of the sign.
3. Any needed encroachment permits shall be obtained from the Department of Public Works prior to erection of the sign.
4. The Division of Traffic Engineering shall verify that the proposed sign will not obstruct the sight triangle, as required by Article 3-3 of the Zoning Ordinance. If the sign does obstruct the sight triangle, the location shall be modified accordingly.

Chairman Stout asked whether there were objectors to the subject appeal present. There was

no response.

Representation – Ms. Stephanie Beck was present on the appellant's behalf. She indicated that she had read, understood and would abide by the conditions for approval.

Action – A motion was made by Ms. White, seconded by Mr. Stumbo, and carried unanimously (Glover absent) to approve **V-2011-73: MID-AMERICA APARTMENTS** (a variance to reduce the required 20' setback for a freestanding identification sign to 0' in a High Density Apartment [R-4] zone on property located at 151 S. Locust Hill Drive) as recommended by the staff and subject to the four conditions recommended by the staff.

- c. **V-2011-74: THOMPSON THRIFT DEVELOPMENT CO.** - appeals for a variance to reduce the required front yard for a Group Residential Project from 70' to 20' in a High Density Apartment (R-4) zone, on property located at 2391 Sir Barton Way. (Council District 6)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity. A frontage yard of 70' will be provided for much of the new development, with the reduced frontage yard of 20' limited to the smaller residential building adjacent to the clubhouse.
2. Strict application of a 70' frontage yard requirement would necessitate that the two residential buildings align rather than be offset, which is not desired by the appellant for architectural and site design reasons. Full compliance would also make it difficult to comply with a required 25' floodplain buffer, unless the size of the smaller residential building was further reduced.
3. The FEMA designated 100-year floodplain along the side and rear of the property is a special circumstance that contributes to justifying a reduction of the frontage yard width at this location.
4. Since the appellant has chosen not to subdivide the subject property into two lots (which is technically feasible), and thereby avoid a Group Residential Project designation and the associated frontage yard requirement, it is clear that there is no intent to circumvent a requirement of the Zoning Ordinance. A focused effort is being made to substantially comply with the Zoning Ordinance requirements while reducing possible impacts to the floodplain and enhancing design features of the development.

This recommendation of approval is made subject to the following conditions:

1. The property shall be developed in accordance with the submitted application and site plan, or as amended by the Planning Commission.
2. All necessary permits shall be obtained from the Division of Building Inspection and the Division of Engineering (for special use permits that may be required for parking and other activities in or near the floodplain) prior to construction.
3. A note regarding action of the Board shall be placed on the final development plan for the subject property.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Richard Murphy, attorney, was present representing the appellant, along with Mr. Mark McIntosh. Mr. Murphy indicated that they had read, understood and agreed to abide by the conditions for approval.

Action – A motion was made by Ms. Meyer, seconded by Mr. Griggs, and carried unanimously (Glover absent) to approve **V-2011-74: THOMPSON THRIFT DEVELOPMENT CO.** (a variance to reduce the required front yard for a Group Residential Project from 70' to 20' in a High Density Apartment [R-4] zone on property located at 2391 Sir Barton Way) as recommended by the staff and subject to the three conditions as outlined by the staff.

- d. **C-2011-69: RHONDA HENZMAN** - appeals for a conditional use permit to establish a home occupation (embroidery services) in a Single-Family Residential (R-1C) zone, on property located at 3033 Tates Creek Road. (Council District 4)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely impact the subject or surrounding properties. Materials and equipment typically used for embroidery are relatively safe and should not generate significant levels of noise or other potential disturbances. No significant increase in traffic or parking demand is anticipated.
2. All necessary public services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The home occupation shall be established in accordance with the submitted application and site plan, and shall at all times comply with the provisions of Article 1-11 of the Zoning Ordinance.
2. An occupancy permit shall be obtained from the Division of Building Inspection within 30 days of action by the Board.
3. This conditional use permit shall become null and void should the appellant cease to either own or occupy the residence on the subject property.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Ms. Rhonda Henzman, appellant, was present. She indicated that she had read, understood and agreed to abide by the conditions for approval.

Action – A motion was made by Ms. Moore, seconded by Mr. Stumbo, and carried unanimously (Glover absent) to approve **C-2011-69: RHONDA HENZMAN** (a conditional use permit to establish a home occupation [embroidery services] in a Single-Family Residential [R-1C] zone on property located at 3033 Bates Creek Road) for the reasons recommended by the staff and subject to the three conditions recommended by the staff.

- e. **A-2011-68: JAMES D. ATKINSON** - appeals for an administrative review to allow a second detached garage, resulting in accessory structures exceeding the allowable lot coverage and being larger than 50% of the size of the principal residence in a Single-Family Residential (R-1B) zone, on property located at 450 Kingston Road. (Council District 6)

The Staff Recommends: Approval, for the following reasons:

1. A moderate increase in the allowable square footage for accessory buildings is justified in this particular case, due to the large size of the lot and plentiful open space that is available. These conditions prevent this modest increase from being considered a circumvention of the Zoning Ordinance.
2. An additional accessory building of the size proposed should not adversely affect any of the adjoining properties, which includes the vacant lot to the north that is owned by the appellant.
3. Multiple accessory buildings on single properties are common in the general vicinity, so the overall character of the neighborhood should not be diminished by the proposed construction. Clearly, a second accessory structure of some sort is permitted on the subject property by the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The additional detached garage shall be constructed and used in accordance with the submitted application and site plan.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Scott Book, with Economy Home Improvement, was present on the appellant's behalf. He indicated that they had read, understood and agreed to abide by the conditions for approval.

Action – A motion was made by Ms. Meyer, seconded by Ms. White, and carried unanimously (Glover absent) to approve **A-2011-68: JAMES D. ATKINSON** (an administrative review to allow a second detached garage, resulting in accessory structures exceeding the allowable lot coverage and being larger than 50% of the size of the principal residence in a Single-Family Residential [R-1B] zone on property located at 450 Kingston Road) as recommended by the staff and subject to the two conditions as outlined by the staff.

- B. **Transcript or Witnesses** - The Chairman announced that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

1. **V-2011-58: JAMES HICKEY** - appeals for a variance to reduce the required side yard from 3' to 9" for retention of a home addition; and a variance to reduce the required rear yard from 10' to 0' for retention of a deck in a Planned Neighborhood Residential (R-3) zone, on property located at 3606 Windgate Way. (Council District 4)

The Staff Recommends: Postponement, for the following reasons:

- a. Because the deck encroaches into the adjoining property to the rear, an additional variance for that property is required to reduce the rear yard to zero feet. The appellant has described such a variance in his request; however, there is no indication in the application materials (such as a letter of permission from that property owner) that he has the right to ask for that variance.
- b. Notification to property owners within a 200-foot radius around that property must be provided if a variance is requested for that property (356 Big Bear Lane), as well as legal notice in the newspaper. A one-month postponement will allow time to provide the necessary letter of permission from the adjoining property owner, as well as notification letters to surrounding property owners, for the variance request.

Representation – Mr. Richard Murphy, attorney, was present representing the appellant, Mr. James Hickey, who also was present. An exhibits packet was distributed to the Board for review.

At this time, Mr. Griggs announced that he would recuse himself with respect to this matter because he was a personal friend of the applicant.

Chairman Stout noted the staff's recommendation for postponement of this case. Mr. Murphy responded that they were aware of the recommendation and were actually agreeable with the postponement; however, it was his understanding that the neighbors were anxious to get this issue resolved. He noted support from nearly all the neighbors in the vicinity, as the signed petition on page 3 of the handout illustrated, with the exception of an adjoining property owner.

Referring to the site plan shown on the overhead (at the Chairman's request), Mr. Murphy spoke to the variances that are being requested. He said one of the requested variances is needed at the rear of the

property, where the deck was built over the property line; and the other two on either side of the property, where there is a 3-foot setback requirement. He spoke about the postponement that was granted by the Board last month, during which time the applicant was able to reach an agreement with the property owner in the rear, Mr. Dillingham with Taras Realty & Development, to transfer a strip of land along the back in order to retain the deck, as the letter on page 4 of the handout indicated. He noted that a surveyor has been hired and a consolidation plat will be done for submittal to the Planning Commission, which will take some additional time. Therefore, Mr. Murphy asked for an indefinite postponement with respect to the rear yard variance, to allow enough time for completion of the survey and approval of the consolidation plat, after which this portion of the variance request would be withdrawn. He also said that an indefinite postponement would eliminate having to pay an additional filing fee in the event that it was necessary to come back to the Board. If that were the case, Mr. Murphy said they would have to re-notify all the surrounding neighbors, just as they would have to do for a new hearing. He added that they were confident about getting these items worked out and completed.

Mr. Murphy said what they are currently requesting is a variance for the deck along the south side, from 3 feet to 1½ feet, as well as a variance from 3 feet to 9 inches along the north side in order to retain a portion of the new addition and deck. He noted that Mr. Hickey has been working with his neighbors and acknowledged the letters of support from Mr. Godby, who lives next door at 3608 Windgate Way, and Mr. Raider, who lives across the street at 3605 Windgate Way. A copy of the letters was included in the handout on pages 1 and 2, respectively. He also reiterated about the signed petition of support, which indicated that the neighbors in the cul-de-sac felt the sunroom and deck were in keeping with the style and character of the neighborhood; and the additions were well constructed, aesthetically pleasing and would increase their property values.

Mr. Murphy provided a brief history of the Walden Grove subdivision, the location of the subject property, which was built about 30 years ago. He stated that the developer (Mr. Walker) came up with the concept of building contemporary homes and maintaining the topography of the area. Mr. Murphy said these houses are different from typical subdivisions in that they are contemporary or California style homes with wood siding and decks off the back where the yards slope downward toward a treed area at the rear of the properties along Windgate Way. He said the appellant has a contemporary house, with an open design and a lot of light, and the deck is a living space. He noted that when this subdivision was built in the 80s, a zero setback was allowed under the ordinance and the houses could be built up to the property line; but there had to be 6 feet between the houses, a provision that was later changed to 3 feet.

Mr. Murphy went on to say that the reason they were here was because, about a year ago, Mr. Hickey built an addition to his house in the footprint of a previously existing deck, without a building permit; and the deck was built closer than 3 feet to the property line. The appellant did not have a contractor because he and his friends did the work themselves; and he also was dealing with a family health issue during that time that prevented him from attending to all the details. He said Building Inspection received a call after the construction was completed and \$70,000 to \$80,000 had been spent on the addition.

Mr. Murphy noted that it was not uncommon in the neighborhood for additions to be built without a building permit. For the purpose of illustration, he cited the deck and screened-in porch on the house next door (to the north). He said, regardless of whether a permit was issued, a variance was fully justified on this property. Photos were shown of the interior of the sun room addition (looking toward the deck); an interior view of the wall that is 9 inches off the property line (the notched area shown on the site plan); an exterior view of the deck and sun room addition; a street view of the addition in relation to the neighboring Harris property (at 3604 Windgate Way); frontal and rear views of the "complementary notches" on both structures along the side property line; and a side view of the addition and privacy fence. A rendering was shown to illustrate the distance between the complementary notches near the front (7'10") and the rear (11'6") of the appellant's house and the neighbor's house at 3604 Windgate Way.

Mr. Murphy stated that the finished addition, which he reiterated was built on the footprint of an existing deck, was more than 10 feet away from the house next door, noting that the ordinance requires a separation of 6 feet. He also said the appellant had spoken with the Chairman of the Board of KY Appraisers in Frankfort (Mr. Larry Disney) regarding the quality of construction and aesthetics of the addition, and was informed that it would in no way lower property values in the neighborhood. He said

although the topography and layout of the houses fully justify the variance, and despite the absence of building permit, the concern was raised regarding a doctrine in law called laches, whereby a property owner cannot sit on his/her rights and watch something being done that, as a result, will cause them damage. He opined that, rather than waiting until the completion of the project, any concerns should be expressed when it starts.

In closing, Mr. Murphy said there was a letter from the neighbor to the south that supported the granting of the variance in order to retain the sunroom/deck addition. He also said this was a difficult situation to be in, and the appellant admittedly was embarrassed, citing his ignorance of the law; however, it was a particularly stressful time for him. Mr. Murphy reiterated that the addition is located at the same setback as the previous deck; it is in keeping with the concept of the developer when the Walden Grove subdivision was originally built; and the privacy of the property next door will be preserved. Mr. Murphy noted the proposed findings to support the granting of the variance appeal and asked for the Board's favorable consideration.

At this time, Chairman Stout asked to hear the objector's comments.

Opposition – Mr. Greg Harris, 3604 Windgate Way, was present, along with Ms. Lynn Harris. Mr. Harris said he agreed that this is a beautiful building; but he was concerned that it is only 9 inches off the side property line facing his house. He briefly spoke about the discussion he had with Mr. Hickey about the previous deck which, once constructed, was causing runoff problems on his property because of the sloped roof that was installed. He said the fact that this was unacceptable was discussed with Mr. Hickey several times; and as a result, a gutter system was installed that eventually did not function properly due to the lack of maintenance.

Mr. Harris stated that when the old deck structure was removed and construction started on the new addition and deck, he assumed it was legally permitted, inspected and the location approved; and that he would be unable to do anything about. However, he subsequently found out that there was no building permit for the addition that now was finished. Mr. Harris reiterated about the close proximity of the building addition to the side yard property line and fence, and the roof overhang that was causing the same kind of runoff problem he experienced previously. He spoke about the appellant's limited ability to maintain the property without coming through either his or a neighbor's yard, which was the case when construction materials and scaffolding were brought in for this project.

Chairman Stout asked if Mr. Harris was still getting water runoff when it rains, to which he responded affirmatively. Mr. Harris added that he removed the fieldstone patio on his property because of the runoff, as shown in one of the photos presented earlier. He said those photos were actually taken from his property because there was no way to access the appellant's property to take them.

Considering that the building has already been constructed, Chairman Stout asked what would satisfy Mr. Harris in this situation relative to the variance request. Mr. Harris said it was mentioned that, in an appraiser's opinion, the appellant's building addition would not devalue the homes in the neighborhood; however, he felt that this would not hold true for his property since it is right next door; and that it may jeopardize his ability to sell the property in the very near future. He said he was offered \$2,000 by Mr. Hickey for the purchase of a small portion of his property for the variance and the right to leave the windows in the wall of the addition and everything (else) that was done, which Mr. Harris felt was not being fair to him. Mr. Harris also felt that, considering the line of work Mr. Hickey was in, he had made an obvious error and showed a lack of judgment by not checking with the city prior to starting the project. He said he wasn't sure what an appropriate remedy to this situation would be; and that Mr. Hickey hadn't been a bad neighbor, and he didn't necessarily want to see the building torn down, but the situation needed to be addressed.

Chairman Stout asked Mr. Harris if, in his opinion, this situation could be rectified without tearing anything down. Mr. Harris said that he had a discussion with Mr. Hickey about the possibility of selling a small strip of land to him for consolidation, which was done with the property owner at the rear; but they were unable to reach an agreement on the price. Chairman Stout then asked whether Mr. Harris was willing to be "uncomfortable" if Mr. Hickey pays for it. Mr. Harris said no, that he would prefer to have this fixed so that his property would not be adversely affected; and that he didn't want Mr. Hickey's money.



Ms. Meyer related her understanding that Mr. Harris was concerned about his property value, as well as some water that is coming onto his property. Mr. Harris said that was correct. She asked if there had been any discussion about possibly having an expert come in and work on the water issue with them, suggesting the use of landscaping, rock, drainage pipes, etc. Mr. Harris replied that, at one point, Mr. Hickey had offered to re-do his side yard; but this was while the work on the addition was still ongoing. He said regardless, it would still be necessary for Mr. Hickey to use his property for access, since the deck encompasses the entire rear yard. He also noted that the proximity of the fence to the appellant's house limits access for maintenance purposes. Ms. Harris added that the room addition has windows and sits up high, over the fence; and there was no privacy.

Chairman Stout asked for comment from Building Inspection regarding this situation and any options that were available. Mr. Hume said if the property line, fence, deck and room addition facing the neighbor remain as is, the left side property line wall must be fire rated and the windows must be closed up; and that the fire rating issue would be Building Inspection's biggest concern, as far as getting the wall constructed correctly.

In response to Ms. Moore's request for clarification, Mr. Hume stated that fire rating is an assembly of materials that provides fire suppression for a certain amount of time. He said the building code regulates this based on, among other things, the distance from a structure to the property line. Regarding the water control issue, Mr. Hume said he has not been to the site and didn't know if there was a manageable way to handle the runoff, such as using a larger gutter system and piping the water down to the ground and away from the property. He said if there is a soffit that hangs over from the wall and over to the fence close to the property line, it obviously cannot extend over the property line, even with the gutter on it. He said in certain cases, where there is a really tight property line issue, one straight wall is constructed all the way up to the roof line and there is no soffit. When the wall construction reaches a certain point, the gutter can be hung on it and maintenance can be done on the correct property.

Mr. Hume went on to say that if the appellant wanted to change the property line, it was certainly up to him. However, in view of the current circumstances, the Board could direct him to take the addition back to the point of where it started, or grant a variance of 18 inches off the property line and have the width of the building reduced so that the appellant has some ability to maintain the addition. He said the appellant would get a somewhat wider building and the neighbor would get a little more relief with respect to the side property line. He reiterated that leaving this as it is, the fire rating issue would be Building Inspection's big concern.

Chairman Stout asked if Engineering had any comment. Mr. Saylor said they mainly look at new home construction, which typically does not include a remodel or an addition; but if they are called to give their opinion, they will do that. He offered to meet with the property owners to try to come up with a solution to their problem.

Chairman Stout asked whether the requested variances are dependent upon the purchase of the strip of land at the rear. Mr. Murphy responded that the variances assume the worst case scenario, or that no property is acquired, just as it is today. Chairman Stout then asked why they would request a variance first, knowing of a potential problem with the building addition extending over the property line. Mr. Murphy responded that it does not extend over the property line, but is 9 inches away at the current time. Referring to the photo that was shown, he said the fence on Mr. Hickey's side is almost on the property line; and that the wall of the house does not come up to the fence. He said they do not go over the property line at all.

Chairman Stout commented that he didn't think the neighbor totally objects to what has happened, despite that it was done without a building permit; but he did express being very uncomfortable because of the adverse impact this has had. Mr. Murphy responded that they had listened to the neighbor's comments. He said one thing that will happen, if there is no land purchase, is that Mr. Hickey would have to remove the upper window because the wall is not fire rated, which may increase the privacy on the Harris property. Regarding the testimony given earlier, he reiterated about the discussion between Mr. Hickey and Mr. Harris about the land purchase, because about 24 square feet was needed to push the property line out two feet along the side of the wall. However, Mr. Hickey's offer of \$2,000 for the strip of land was countered with a substantially higher price. Mr. Murphy went on to say that the Harris family had legitimate concerns; and that he had conferred with Mr. Hickey about what they could

propose if an agreement on the small land purchase could not be reached: 1) Remove the window and meet the fire rating requirements; 2) install gutters to help with the runoff; 3) install new sod; and 4) hire an engineer with hydrology experience, at the appellant's expense, to evaluate the situation to see what needs to be done. He also welcomed having the expertise of the City Engineer.

Chairman Stout stated that, after hearing the testimony from both sides in this appeal, he would vote no if the Board took action right now. He felt that this case should be continued, perhaps indefinitely, until the appellant was able to get this situation worked out to the satisfaction of Building Inspection, Engineering and the directly effected neighbor. He said he understood that there were people in favor of allowing Mr. Hickey to keep the room addition and deck, but they didn't live right next door to it. He said from what he had heard today, this was not ready for the Board to take action on, citing the staff's recommendation of postponement. He further stated that the testimony about compensation was irrelevant; and that this matter is about what is right and what is wrong.

Mr. Murphy reiterated what he had said at the beginning, that they were agreeable with the staff's recommendation of postponement. He stated that they went forward out of respect to Mr. Harris because they knew he wanted this to be heard, considering the situation with selling his house. He said they were still agreeable to a postponement if that was the will of the Board.

Ms. Moore clarified that it would be a continuance, rather than a postponement, which Mr. Murphy acknowledged.

Chairman Stout opined that if a continuance was requested, it would be with the understanding that they would try to get the issues that were discussed worked out before coming back to the Board.

After conferring with his client, Mr. Murphy told the Board that they wished to request a continuance. He said he didn't think a continuance until the November meeting, which was only three weeks away, was enough time to get everyone out there to look at the situation. He said the Board may want to continue this case to December or to continue it indefinitely, either of which would be agreeable.

Mr. Marx pointed out that an indefinite continuance was problematic because of enforcement and public safety related issues. He felt the continuance needed to be time certain.

Mr. Stumbo suggested a continuance to the January 27 meeting date and asked Mr. Murphy if that would be a reasonable time. Mr. Marx said the neighbor should be consulted on this meeting date as well.

Mr. Harris said he would have no problem with a continuance until January 27, if there was no further delay. He said hopefully they could come to some sort of an understanding or agreement. As far as reasonable compensation, he said the number he gave Mr. Hickey was in direct response to the number he was given; and that he had no desire to have Mr. Hickey's money, but would rather have this situation resolved.

Mr. Stumbo spoke in concurrence with Mr. Stout, saying that he also would not be able to vote favorably on this appeal today. He said if he were in the neighbor's situation, he would probably feel the same way that Mr. Harris does. Mr. Stumbo made the following motion, with the hope that they would be able to work something out.

Action – A motion was made by Mr. Stumbo, seconded by Ms. White, and carried unanimously (Glover absent; Griggs recused) to continue **V-2011-58: JAMES HICKEY** (a variance to reduce the required side yard from 3' to 9" for retention of a home addition; and a variance to reduce the required rear yard from 10' to 0' for retention of a deck in a Planned Neighborhood Residential [R-3] zone, on property located at 3606 Windgate Way) until the January 27 meeting.

(Following disposition of the aforementioned case, the Board returned to V-2011-72: JAMES M. LUDKA.)

D. **Conditional Use Appeals**

None Remaining

E. **Administrative Review**

None Remaining

- IV. **BOARD ITEMS** - The Chairman announced that any items a Board member wished to present would be heard at this time. There were none.
- V. **STAFF ITEMS** - The Chairman announced that any items a Staff member wished to present would be heard at this time.
- A. **2012 Meeting and Filing Schedule** – As part of its Bylaw-related duties, each year the Board of Adjustment adopts the Official Meeting and Filing Schedule for the following year. The draft Meeting and Filing Schedule for 2012 was presented to the Board for review and/or discussion prior to its official adoption.
- Mr. Sallee reminded the Board to review the 2012 Meeting and Filing for possible consideration of adoption. He said this item would be placed on next month's agenda.
- VI. **NEXT MEETING DATE** - The Chairman announced that the next meeting date would be November 18, 2011, one week earlier than usual, due to the Thanksgiving holiday.
- VII. **ADJOURNMENT** - Since there was no further business, the Chairman declared the meeting adjourned at 2:12 p.m.

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Louis Stout, Chairman

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James Griggs, Secretary